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MAY 13, 2004  
**DEPARTMENT OF ENERGY**  
**OFFICE OF HEARINGS AND APPEALS**

**Appeal**

Case Name: Worker Appeal

Date of Filing: March 15, 2004

Case Number: TIA-0061

XXXXXXXXXXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant is the widow of XXXX XXXXXXXX, XXX (the worker), a former DOE contractor employee. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program.<sup>1/</sup> The applicant appeals that determination. As explained below, we have concluded that the appeal should be denied.

**I. Background**

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.<sup>2/</sup>

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or

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<sup>1/</sup> The applicant is disabled. The request for OWA assistance and the present appeal were filed on behalf of the applicant by her son, XXXX XXXXXXXX, XXX, under a Power of Attorney.

<sup>2/</sup> See [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy).

contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. See 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the Program Office. 10 C.F.R. § 852.18(a)(2). See *Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted on the required Work History claim form that her deceased husband worked at the DOE's K-25 Plant in Oak Ridge, Tennessee, from June 21, 1944 to July 31, 1946, as an area foreman. See OWA Case Record at 21 (application dated September 5, 2002). The applicant claimed in her request for Physician Panel review that her husband's carcinoma of the jejunum,<sup>3/</sup> diagnosed in 1969, was caused by his work at the DOE facility. *Id.* at 2. According to the OWA record, the applicant more specifically claims that in the course of his employment the worker was exposed to asbestos, ionizing radiation, green salt, and inhalation of uranium dust. *Id.* at 281.

The Physician Panel issued a negative determination on this claim. In evaluating the claim, the Panel considered the diagnosis of carcinoma of the jejunum cited in the applicant's request. This is also the illness specified as the worker's cause of death on his Death Certificate. See note 3. The Panel determined that the worker's employment by the DOE contractor was not a significant factor in aggravating,

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3/ The OWA Case Record indicates that the worker died on May 1, 1970, at the age of 60. The worker's Death Certificate states the cause of death was "carcinoma of jejunum with metastases." OWA Case Record at 32. Under "Other Significant Conditions," the Death Certificate indicates that the worker also suffered from "Jacksonian epilepsy." *Id.*

contributing to or causing this illness. In reaching this determination, the Panel states in its report:

This case involves a claim by the wife of a worker employed from 6/2/44 through 7/31/46 (age 35 - 37). 24 years after termination for non-medical reasons, the worker developed neoplasm of the jejunum. He died shortly after the diagnosis and surgery of metastatic disease at age 61 years. Although there is no pathology report of the examination of the tumor removed, the hospital summary and death certificate reasonably represent an accurate diagnosis which is reasonably acceptable.

. . . Cancers of the small bowel are rare despite a slow increase over the past. A Medline search from 1960 - 2003 did not reveal any testimonial or epidemiological relationships between risk factors and jejunum tumors. Comparison with the over all [treating hospital] patient population did not identify any risk factors characteristic of this cancer.

. . .

The association between asbestos and GI cancers is not near as strong as it is for lung cancers. After consideration of asbestos as a contributing factor in this case, it was agreed that the possibility was so remote as not to meet the minimal standards required in this review.

Panel Report at 1 (citations omitted).

In her appeal, the applicant does not contest the Physician Panel's determination regarding the worker's diagnosis of carcinoma of the jejunum. Instead, the applicant asserts that the Panel failed to consider another medical condition:

[We] would like to request your consideration of the toxic exposures at K-25 during [the worker's] employment as a cause for his nonmalignant, nonspace occupying glioma of the left cerebral motor nerve. This information was available on the application dated September 5, 2002, however, not considered.

. . .

This illness was very devastating to [the worker] and his family. He would have very severe headaches and an occasional grand mal seizure. [The worker] could work very little from the time he left K-25 with [the DOE contractor] until his death on May 1, 1970. . . . [We] feel that this glioma was either caused or exacerbated by radiation received during his employment at K-25 in Oak Ridge, Tennessee.

The applicant has attached a copy of a hospital medical record dated July 14, 1969, indicating that the worker's glioma was first diagnosed in 1947, one year after being

terminated by the DOE contractor. Appeal, Attachment 2. The applicant contests the statement made by the Panel in its report that the worker was terminated by the DOE contractor in 1946 “for non-medical reasons,” and has attached a company record dated July 22, 1946, in support of her position. Appeal, Attachment 3.

## **II. Analysis**

In her Appeal, the applicant claims that the Physician Panel improperly failed to consider another medical condition suffered by the worker, a glioma of the left cerebral motor nerve (a brain tumor). The applicant believes that the worker’s brain tumor was “caused or exacerbated by radiation” to which the worker was exposed during his two years of employment with the DOE contractor. Our review of the Report confirms that the Physician Panel did not evaluate this condition as a diagnosis requested for review. However, we do not find that the Panel erred in this regard.

In her request to the OWA for Physician Panel Review, the applicant listed only carcinoma of the jejunum, diagnosed on July 19, 1969, as an illness which she believed to be caused by the worker’s employment at a DOE facility. There is no indication in the OWA Case History that the applicant sought to supplement her request with the illness now raised in her Appeal. Further, the worker’s medical records indicate that the symptoms associated with his brain tumor predated his two-year employment at the DOE facility, from June 21, 1944 to July 31, 1946.

The worker’s 1969 hospital record states that the symptoms associated with the brain tumor, diagnosed in 1947, began in “1940 at which time he noticed the onset of numbness in the right upper extremity which was transient first and then became persistent and was associated with Jacksonian seizures. These seizures would involve the right upper extremity, shoulder, neck and face and ultimately there developed some muscle atrophy and some contracture in the right hand muscles on the right.” Appeal, Attachment 2; OWA Case Record at 51. The applicant asserts in her present appeal that the 1969 hospital record is wrong in stating that the worker’s condition emerged in 1940.<sup>4/</sup> However, this information is corroborated by the contractor’s contemporaneous medical records.

The worker’s pre-employment physical examination report, dated June 12, 1944, states that the worker had “Neuritis rt. arm & hand” and that this condition resulted in a “50% loss of function of rt. hand.” OWA Case Record at 231, 232. A company Dispensary Record dated July 2, 1946, states concerning the condition: “Onset 6 years ago. . . . Recommend medical release on the grounds that shift work is apt to aggravate

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<sup>4/</sup> The applicant maintains in her appeal that “[t]he statement that [the worker] was in good health until 1940 is probably wrong also, it should have been 1946.” Appeal at 1.

present physical disability.” *Id.* at 233. Based upon this recommendation, the worker was given a medical termination effective July 31, 1946, after working with the disability for two years. *Id.* at 43, 234, 239; Appeal, Attachment 3.<sup>5/</sup> Since it is apparent that symptoms attributable to the worker’s brain tumor predated his employment, the record does not support the applicant’s claim in her appeal that the condition was caused by his employment with the DOE contractor.

We conclude that the Physician Panel properly limited its evaluation to the worker’s carcinoma of the jejunum, specified in the applicant’s request and stated as the cause of death in the worker’s Death Certificate. We therefore find that the applicant’s Appeal does not establish any deficiency or error in the Panel’s determination. Because the applicant has not identified a deficiency or error in the Panel’s determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the Appeal should be denied.<sup>6/</sup>

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0061 be, and hereby is, denied.
- (2) This is a final Order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: May 13, 2004

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<sup>5/</sup> The applicant is correct that the Physician Panel was erroneous in stating in its report that the worker was terminated in 1946 “for non-medical reasons.” However, this statement had no bearing upon the Physician Panel’s determination regarding the illness under review, carcinoma of the jejunum, diagnosed in 1969.

<sup>6/</sup> The applicant may contact the OWA concerning the possibility of Physician Panel review if she wishes to pursue the claim that radiation exposure while employed at the DOE facility was a significant factor in aggravating the worker’s brain tumor.